

MAY 7 1976

MICHAEL R. ROSS, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1627

JACKSON COUNTY, MISSOURI, KANSAS CITY, MISSOURI, AND THE OFFICE OF PUBLIC COUNSEL OF THE STATE OF MISSOURI,

Petitioners,

vs.

THE PUBLIC SERVICE COMMISSION OF MISSOURI AND MISSOURI PUBLIC SERVICE COMPANY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI

STANLEY CHRISTOPHER

Deputy County Counselor

RUSSELL D. JACOBSON

Associate County Counselor

JEREMIAH D. FINNEGAN

Special County Counselor

WILLARD B. BUNCH

County Counselor

Rm. 701-M

Jackson County Courthouse

415 East 12th Street

Kansas City, Mo. 64106

*Attorneys for Petitioner,
Jackson County, Missouri*

CARROL C. KENNETT

Assistant City Attorney

City Hall

414 East 12th Street

Kansas City, Mo. 64106

*Attorney for Petitioner,
Kansas City, Missouri*

WILLIAM M. BARVICK

911A Leslie

Jefferson City, Mo. 65101

*Attorney for Petitioner,
Office of Public Counsel*

TABLE OF CONTENTS

OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	3
STATEMENT	3
REASONS FOR GRANTING THE WRIT	6
Rate Making Procedures Under Missouri Law	8
(I) The Requirements of Procedural Due Process As Applied to State-Created Entitlements	11
Is a Consumer Entitled to Notice and an Opportunity to Be Heard on Proposed Rate Increases If He Has a Constitutionally Protected Interest?	15
(II) Is a Utility Regulatory Scheme Which Places a Significantly Heavier Burden Upon a Consumer Who Challenges Agency Action Than It Places Upon the Utility to Challenge Comparable Agency Action a Denial of Equal Protection?	19
CONCLUSION	21
APPENDIX A—Constitutional and Statutory Provisions Involved	A1
APPENDIX B—Opinion, in Part, of Trial Court	A5
APPENDIX C—Opinion of Missouri Supreme Court	A7

Table of Citations

CASES

<i>Assoc. of Data Processers Serv. Organizations v. Camp</i> , 397 U.S. 150	15
<i>Bell v. Burson</i> , 402 U.S. 535	12, 16
<i>Board of Regents v. Roth</i> , 408 U.S. 564	12, 13, 16
<i>Condosta v. Vermont Elect. Co-Op et al.</i> , (Vt. 1975) 400 F. Supp. 358	13
<i>Federal Power Comm. v. Natural Gas Pipeline Co.</i> , 315 U.S. 574	14
<i>Fuentes v. Shevin</i> , 407 U.S. 67	12, 16
<i>Goldberg v. Kelly</i> , 397 U.S. 254	12
<i>Goss v. Lopez</i> , 419 U.S. 565	12
<i>Holt v. Yonce</i> , (S.C. 1973) 370 F. Supp. 374, aff'd with- out opinion 415 U.S. 969	17, 18
<i>Jackson v. Metropolitan Edison Co.</i> , 419 U.S. 345	18
<i>Lightfoot v. City of Springfield</i> , (Mo. Sup. 1951) 236 SW 2d 348	11
<i>Matthews v. Eldridge</i> , 44 U.S. Law Week 4224 (Feb. 24, 1976)	12
<i>May Dept. Stores Co. v. Union Electric L. & P. Co.</i> , (Mo. Sup. 1937) 107 SW 2d 41	9, 10
<i>Mullane v. Central Hanover Bank & Trust Co.</i> , 339 U.S. 306	16, 17
<i>Office of Communication of the United Church of Christ et al. v. FCC</i> , (C.A. D.C. 1966) 359 F 2d 994	15
<i>Ohio Bell Tel. Co. v. Public Utilities Comm.</i> , 301 U.S. 292	16
<i>Regional Rail Reorganization Act Cases</i> , 419 U.S. 102 ..	13
<i>Robbins v. Webb's Cut Rate Drug Co.</i> , (Fla. Sup. Ct. en banc, 1943) 16 So 2d 121	16

<i>Sellers v. Iowa Power & Light Co.</i> , (S.D. Iowa 1974) 372 F. Supp. 1169	17, 18
<i>Sniadach v. Family Finance Corp.</i> , 395 U.S. 337	12
<i>State ex rel. City of Sedalia v. Public Serv. Comm.</i> , (Mo. Sup. Ct. 1918) 204 SW 497	8
<i>Straube v. Bowling Green Gas Co.</i> , (Mo. Sup. Ct. 1950) 227 SW 2d 666	11
<i>Terre Haute Gas Corp. v. Johnson</i> , (Ind. 1942) 45 NE 2d 484	15
<i>Wisconsin Tel. Co. v. Public Serv. Comm.</i> , (Wis. Sup. Ct. 1939) 287 NW 122, cert. den. 309 U.S. 657	17

STATUTES AND CONSTITUTIONAL PROVISIONS

United States Constitution, Par. 1, Amendment XIV	3, 6, 11, 15
Missouri Public Utilities Law—	
393.130, R.S. Mo. (1969)	3, 9, 13, 14
393.140, R.S. Mo. (1969)	3, 5, 6, 10, 11, 18
393.150, R.S. Mo. (1969)	3, 10, 19
393.260, R.S. Mo. (1969)	3, 5, 10, 19
393.270, R.S. Mo. (1969)	3, 5, 10
393.280, R.S. Mo. (1969)	3

MISCELLANEOUS

T. R. Whitmer, "Consumers' Appeals From Public Ser- vice Commission Rate Orders", 8 Univ. of Chicago L. Rev. 258-279 (Feb. 1941)	14
--	----

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. _____

JACKSON COUNTY, MISSOURI, KANSAS CITY, MISSOURI, AND THE OFFICE OF PUBLIC COUNSEL OF THE STATE OF MISSOURI,

Petitioners,

vs.

THE PUBLIC SERVICE COMMISSION OF MISSOURI AND MISSOURI PUBLIC SERVICE COMPANY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI

Jackson County, Missouri, a charter county, and Kansas City, a charter city, both political subdivisions of the State of Missouri, and the Office of Public Counsel of the State of Missouri, petitioners, pray that a writ of certiorari issue to review the judgment of the Supreme Court *en banc* of the State of Missouri entered against them in the above-entitled case on December 22, 1975.

OPINIONS BELOW

The Circuit Court of Jackson County, Missouri rendered a written opinion order, that is not officially reported, but which is reprinted in pertinent part in Appendix B to this petition. The opinion of the Supreme Court of Missouri *en banc* is reported at 532 SW 2d 20, and set

forth in Appendix C to this petition, including the order of that tribunal overruling petitioners' motion for rehearing with separate dissenting opinion which is reported at 532 SW 2d 20, and also set forth in that Appendix.

JURISDICTION

The Judgment of the Mo. Sup. Ct. *en banc* was entered on December 22, 1975, with one judge concurring separately. A timely petition for rehearing was filed on January 6, 1976 and denied on February 9, 1976, with one judge dissenting. This Court has jurisdiction to review the judgment herein by writ of certiorari under 28 U.S.C. Section 1257(3).

QUESTIONS PRESENTED

(I) Do state rate making procedures sufficiently affect the property interests of a utility consumer to entitle him under the due process clause of the Fourteenth Amendment to notice and some type of opportunity to be heard before rates heretofore established by a state regulatory agency can be changed, especially where state law provides no method for recovery by the customer of any overcharges? Furthermore:

(a) Are health, safety and welfare so dependent upon electricity that it is an essential entitlement or interest which requires notice and some kind of opportunity to be heard before the price charged can be increased with no method for recovering any amount later determined to be excessive?

(b) Is the value and utility of other property owned by a customer, for example, appliances, machinery, dwelling

house or business, so subject to significant reduction by increases in the price charged for electricity that it constitutes property subject to being lost through state rate making procedures and therefore entitling its owner to notice and some type of hearing before electricity rates may be increased in a manner that devalues it?

(II) Does the equal protection clause of the Fourteenth Amendment permit a scheme of rate regulation that places significantly heavier procedural burdens upon a consumer who desires to challenge the reasonableness of a state regulatory agency's action in allowing a rate to become effective than it does upon a utility that would challenge agency action in suspending or denying the utility an increased rate?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves: Par. 1, Amendment XIV of the Constitution of the United States; and Sections 393.130, 393.140(11), 393.150, 393.260, 393.270, and 393.280, all from Revised Statutes of Missouri (1969). The pertinent provisions thereof are set forth in full in Appendix A to this petition.

STATEMENT OF THE CASE

This cause arises out of a utility rate-making proceeding, originating on August 5, 1974 when an electrical utility, Missouri Public Service Company (MPS), filed a revised rate schedule with the Missouri Public Service Commission (PSC) for its approval of a rate increase. This filing was made pursuant to the provisions of § 393.140(11)

of the Missouri utility regulatory law, which, in essence, allows a utility to file suggested rate changes with the PSC for its approval, and if the Commission accepts it and does not suspend the filing and order hearings on the proposed rate's reasonableness (per § 393.150), then the new rates go into effect upon Commission approval.

No notice of this filing was given or ordered by the PSC to any person affected by the change within the utility's service area, nor did the utility do so. By chance one of the petitioner's attorneys saw mention of the filing in a news story (also see dissenting opinion, 532 SW 2d at 35, App. C), and thereafter (August 15-21, 1974) various motions to strike the proposed rate were filed by petitioners with the Commission, but overruled (a chronology of pleadings is set forth in the Supreme Court opinion, 532 SW 2d at 22-3, fn. 1, App. C). The PSC did later suspend the filing and order hearings, but on June 13, 1975 approved the increase. Petitioners thereafter filed a review petition in the Circuit Court of Jackson County, Missouri.

Petitioners also filed in the Circuit Court a motion for immediate reversal of the Commission order, upon which motion evidence was heard. The trial court found in petitioners' favor and entered judgment reversing and remanding the cause to the PSC (App. B). This judgment was appealed by respondents here to the Missouri Supreme Court en banc (Missouri's highest appellate tribunal) and was briefed and orally argued there by petitioners and respondents (as well as by amici curiae).

On December 22, 1975 the Supreme Court entered its decision (one justice concurring and one abstaining), which reversed the trial court's judgment. Motion for rehearing was filed on January 6, 1976, by petitioners, and denied on February 9, 1976, with one justice dissenting (See App. C).

PRESENTATION OF FEDERAL QUESTIONS

Petitioners from the beginning have contended that the Commission was outside of its lawful authority to consider the proposed rate increase, because initiation by the "file" method pursuant to 393.140(11) was erroneous for a number of reasons and any proposed change should have been made by way of a "complaint" filed by the utility pursuant to §§ 393.260 and 393.270, which require notice and hearing. These contentions were raised anew before the Circuit Court in the review proceedings. The trial court in his reversal order found that: "[t]he proceedings which resulted in the report and order [by the PSC] under scrutiny were initiated by the filing by MPS of revised rate schedules. The exclusive procedures under Sec. 393.270 . . . are respondent's own motion or complaint of any interested party. It follows that the proceedings and resulting report were and are a nullity." (App. B).

One central issue on appeal was whether the Commission's approval of an increase initiated under the 393.140 (11) "file" method was lawful. Respondents (and amici curiae utilities) contended that such a method satisfied the demands of equal protection and due process, while petitioners argued that the method was constitutionally improper for failure to provide notice and hearing, therefore violating the Fourteenth Amendment's due process and equal protection guarantees, especially in view of the failure of the law to provide refunds to consumers for overcharges.

In the principal opinion the Missouri Supreme Court concluded that an electric rate increase could be lawfully initiated by the "file" method of 393.140(11), and ruled on the constitutional issues, holding that there was no violation by use of the 393.140(11) method, of either due process

or equal protection guarantees of the Fourteenth Amendment, because consumers do not have a property interest in the present level of rates which is protectible by procedural due process (532 SW 2d at 30-33). The concurring opinion disagreed, concluding that consumers had a right not to be charged unreasonable rates, and were entitled to notice and an opportunity to be heard before a new rate went into effect (532 SW 2d at 33). The dissent also concluded that petitioners were arguing for a consumer's right to notice of any proposed increase and for an opportunity to be heard, but that they did not claim a right to the continuation of a specific fixed rate. The dissent concluded that failure to accord notice and hearing under the statute violated the Fourteenth Amendment (532 SW 2d at 33-37).

Jurisdiction is invoked here under 28 U.S.C. § 1257(3), on the grounds that the validity of a state statute, 393.140 (11), is drawn in question on the ground of its being repugnant to the Constitution (Section 1, Amendment XIV) of the United States, which questions were considered and decided by the highest court of the State of Missouri, the Supreme Court en banc. Also see: *Charleston Fed. Savings & Loan v. Alderson*, 324 U.S. 182, 185-6, and *Saltonstall v. Saltonstall*, 276 U.S. 260, 267-8.

REASONS FOR GRANTING THE WRIT

The Court should grant this writ because (1) the decision of the Missouri Supreme Court is contrary to the decisions of this Court regarding the protection afforded citizens of the United States under the due process and equal protection provisions of the 14th Amendment to the Constitution of the United States and (2) the essential nature of utility service, its rapidly increasing costs and the related issues of how that cost is to be spread among

various classes of users and its relationship to energy conservation and economic development are of vital national concern.

This case presents the questions of (1) whether a consumer has a sufficient interest to require that the process by which a just and reasonable utility rate is determined includes a right to notice and an opportunity for some type of hearing before a utility is allowed by a state regulatory agency to permanently change rates previously determined to be just and reasonable, and (2) if no prior notice or hearing is required before a permanent change in rates is approved, does a procedure which places a different and significantly heavier burden on a consumer who challenges administratively approved rates than it places on a utility that challenged the same rates violate the command of equal protection of the law.

Petitioners do not contend that they have a constitutionally protected right to the continuation of a specific fixed rate. Rather, they claim only that because they are guaranteed a just and reasonable rate they have a right or entitlement to participate in the rate-making process, at least to the extent of notice and some kind of opportunity to be heard before an increased rate is finally approved.

The dissenting justice below rendered a succinct version of the consumers' problems and part of their contentions when he wrote:

"Under the principal opinion the commission when a tariff or increase of rates is filed might (as it legally could) do nothing and thirty days later the customers would be paying higher rates without knowing what happened to them. In fact, if the commission so decided for 'good cause', the increased rates could go into effect almost immediately, as the statute allows

the commission under those circumstances to forego the thirty days' notice. All this could be done without the utility making any actual showing whatever that its present rates were unreasonable, because the statute does not require the filing of anything more than whatever is contained in the tariff sheet and the tariff sheet is nothing more or less than a price list.

The principal opinion rejects the due process argument advanced by relators on the basis that there is no protected property interest in the present level of utility rates. It seems to me, however, that what the consumers are contending here is not that they have the property right in a specific fixed utility rate, but that they have a right to receive notice of any proposed rate increase and to be afforded an opportunity to be heard prior to an increase going into effect. They do not claim a right to a specific rate but they do claim the right to just and reasonable utility rates, which is what is required by the statute." (535 SW 2d at 35, App. C)

Rate Making Procedures Under Missouri Law

The Missouri legislature in 1913 enacted a comprehensive utility regulatory law, which included dispensers of electricity to customers (Chap. 393, R.S.Mo. (1969)). By this intervention into the utility field the state departed from its traditional public policy in dealing with public utilities, and pursuant to its police power, assumed the authority to ascertain and establish reasonable rates for public service, delegating the power to ascertain and fix such rates to a state regulatory authority, the Public Service Commission. *State ex rel. City of Sedalia v. Public Service Comm.*, (Mo. Sup. 1918) 204 SW 497, 498. In enacting this regulatory scheme, the legislature specifically guaranteed

to all persons that "[a]ll charges made or demanded by any . . . electrical corporation . . . for . . . electricity . . . shall be just and reasonable and not more than allowed by law or by order or decision of the commission". Subs. 2, Sec. 393.130.

Generally, the Public Service Commission has exclusive jurisdiction over rate-making, and can do so either by approval of rate schedules filed with it or by order after investigation or hearing. A utility has no right to fix its own rates or to agree upon rates with its customers, and cannot charge and collect rates that have not been established by the PSC. As its authority for every rate for every kind of service it desires to furnish, the utility must show Commission approval. It is the utility and not the customer that must in the first instance take affirmative action to have a rate established by the PSC and should do so before beginning to furnish the service involved. Acceptance of schedules by the Commission may show such approval. *May Dept. Stores Co. v. Union Electric L. & P. Co.*, (Mo. Sup. 1937) 107 SW 2d 41, 57.

The rate-making method here is what has been called the "file" method, provided for in Section 393.140(11), which specifies that:

"Unless the commission otherwise orders, no change shall be made in any rate or charge, or in any form of contract or agreement, or any rule or regulation relating to any rate, charge or service, or in any general privilege or facility, which shall have been filed and published by a . . . electrical corporation . . . in compliance with an order or decision of the commission, except after thirty days' notice to the commission and publication for thirty days as required by order of the commission, which shall plainly state the changes pro-

posed to be made in the schedule then in force and the time when the change will go into effect."

In other words a public utility may by filing schedules suggest to the Commission rates which the utility believes are just and reasonable, and if the PSC accepts or allows them, they become rates authorized by law, but the PSC alone is empowered to make that determination and make them a lawful charge. *May Dept. Stores Co. v. Union Electric L. & P. Co.*, *supra*, 107 SW 2d at 50.

There is no provision in 393.140(11) for notice to parties affected by the proposed increase from the PSC or a right to a hearing on the proposal's propriety. There is no provision for judicial review of a rate increased by this method. The Commission may, if it chooses, suspend the proposed rate before it goes into effect and make a further determination as to the rate's reasonableness (Subs. 1, 393.150) or after the rate becomes law it may then make such inquiry (393.270), or, as noted above it just may allow the proposed rate to go into effect as reasonable, but without the affected customer having any notice of it or having any right to contest the same.

If the PSC allows the rate to go into effect and to be collected, certain limited classes of consumers may file a complaint before the PSC as to the new rate's reasonableness (Subs. 1, 393.260), but the burden of proof on its *unreasonableness* is upon the customers, which poses a substantial burden in costs and time upon persons who generally are least able to afford it.

Furthermore, even though a complaint may be brought, the utility is collecting the increased rate from the consumers and will continue to do so until a final determination is reached on whether or not it is excessive. If the conclusion arrived at finds the increased rate to be

excessive, then the utility would have had the benefit of an overcharge which it would not be required to refund to the customer. Under Missouri law the PSC has first of all no power to promulgate an order requiring a utility to make a pecuniary reparation or refund to its customers, *Straube v. Bowling Green Gas Co.*, (Mo. Sup. 1950) 227 SW 2d 666, 668, and once the utility collects the rate in accordance with these rate schedules, the amount so collected cannot be refunded, but becomes its property. *Lightfoot v. City of Springfield*, (Mo. Sup. 1951) 236 SW 2d 348, 352-354.

This general statutory provision is not peculiar to Missouri. A survey by petitioners of the utility regulatory laws of the several states indicates that at least 34 states have adopted rate change provisions with the same or very similar language as the "file" method authorized by 393.140 (11).¹ Because of the widespread enactment of such laws, and an equally widespread use of such procedures the questions concerning their use are of more than substantial significance.

(I) The Requirements of Procedural Due Process As Applied to State-Created Entitlements.

Recent decisions of this Court have extended the protection granted by the due process clause of the Fourteenth Amendment to the exercise of a broad class of state-created rights. While the state law and not the constitution must be the source from which a specific property right arises, once the state has created such, the protection of due process extends to the exercise or vindication of that right.

1. Probably this "file" method procedure originated in the 1910 amendments to the pioneer New York public service corporations law, a law which many jurisdictions (including Missouri) copied.

Board of Regents v. Roth, 408 U.S. 564. Although this Court has extended the protection of due process to classes of property rights or interests broader than those traditionally recognized at common law, it has recognized that the requirements of due process can be different depending upon the circumstances of the case and the right involved.

However, a close analysis of the cases reveals that legal rights affected by state action are entitled to the basic protection of notice and some kind of hearing. The cases differ in their consideration of what due process requires. For example, in the case of some rights or interests there must be notice and hearing before there can be even a temporary interference with its exercise. *Sniadach v. Family Finance Corp.*, 395 U.S. 337; *Goldberg v. Kelly*, 397 U.S. 254; *Fuentes v. Shevin*, 407 U.S. 67; *Bell v. Burson*, 402 U.S. 535. Other decisions of this Court permit temporary interference with the right as long as there is an opportunity to be heard before the final determination is made. *Matthews v. Eldridge*, 44 U.S. Law Week 4224 (Feb. 24, 1976). Another distinguishing feature of the cases is the type of hearing which due process requires. Due process may be satisfied by relatively simple procedures, e.g., *Goss v. Lopez*, 419 U.S. 565, or may require a more elaborate proceeding.

The thread that ties all of these cases together is that in each instance the party was afforded below or granted by this Court, in its decision, some notice that a right was to be affected by state action and an opportunity for some kind of hearing, whether rudimentary or elaborate, before being permanently deprived of the right by state action. But in the cause below, the Missouri Supreme Court has specifically held that a consumer may be permanently deprived of the right to utility service at a just and reasonable rate, a right created by the legislature, without notice and without an opportunity for some type of hearing. Fur-

thermore state law provides no method by which a consumer deprived of the right to a just and reasonable rate can be made eventually whole, action which this Court in such holdings as *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 156, has said would otherwise be a troublesome problem.

Is a Reasonable Rate for Utility Service a Constitutionally Protected Interest or Entitlement Under Due Process?

This Court, in determining what interests are constitutionally protected, have defined the same as "claims upon which people rely in their daily lives, [a] reliance that must not be arbitrarily determined", adding that a purpose of this constitutional protection is to provide an opportunity for persons to vindicate such claims. *Board of Regents v. Roth*, *supra*, 408 U.S. at 577.

Electrical utility service surely comes within this category. Recent authority has held that a consumer's entitlement to electric service should have at least as much constitutional protection as a property right as did entitlements to airline routes, television channels, and pension and social security benefits. *Condosta v. Vermont Elect. Co-Op et al.*, (Vt. 1975) 400 F. Supp. 358, 365-6. *Condosta*, employing the criteria from *Board of Regents*, concluded that the consumer was required to rely upon electric service in his daily life, e.g., his ability to obtain heat in the winter, refrigeration and cooking of his food, and the light by which he can see at night is dependent upon his receipt of electric service. Further support for entitlement was found by virtue of a Vermont statute requiring utilities to serve all persons alike which is similar to one in Missouri (See 393.130).

The consumer has a substantial property right or interest in his dwelling place or business and in such electrical appliances and fixtures as ranges, refrigerators, heating units, lighting systems, toasters, wiring systems, TV's, radios, etc., whose value may be significantly affected by the price of electricity. This list includes items which are now and have for some time been considered essential to our way of life. Also see Justice Seiler's dissent (App. C) in the court below, and T. R. Whitmer, "Consumers' Appeals From Public Service Commission Rate Orders", 8 Univ. of Chicago L. Rev., 258-279 (Feb. 1941), 264.

That this interest is an entitlement is further demonstrated by the Missouri public utilities law, (1) which guarantees that all such charges or rates be just and reasonable, Subs. 1, 393.130; (2) which directs that a utility must serve all persons alike, and a consumer, therefore, is not to be denied service at the will of the utility, Subs. 3, 393.130; and (3) which specifically makes it a defense in a utility's action against a customer for payment of such charges, if those rates for which suit is brought are in excess of those fixed by the Commission, 393.280. The consumers' interest in obtaining utility service at a just and reasonable rate is a principle well recognized judicially. E.g., *Federal Power Comm. v. Natural Gas Pipeline Co.*, 315 U.S. 574, 607.

Sufficiency of interest to entitle persons to protest administrative agency action (including rate making) has arisen frequently in a kindred area, namely in the question of standing. The trend in this area has been towards increasing the opportunities for such challenge rather than towards the restricting the same, yet the latter result is the achievement of the Missouri's court's holding here. For example this Court has held that "[w]here statutes are concerned, the trend is toward enlargement of the class of

people who may protest administrative action. The whole drive for enlarging the category of aggrieved 'persons' is symptomatic of that trend" *Assoc. of Data Processers Serv. Organizations v. Camp*, 397 U.S. 150, 154. *Office of Communication of the United Church of Christ et al. v. FCC*, (C.A. D.C. 1966) 359 F 2d 994, 1002, is so illustrative, in allowing radio listeners to challenge an agency refusal to hold hearings on the renewal of a radio-TV station license, stating that there was "nothing unusual or novel in granting the consuming public standing to challenge administrative actions", and relying upon cases allowing consumer challenges to rate or price increases. In further justification the Court of Appeals in *Office of Communications* noted that the economic stake of listeners who collectively had a huge aggregate investment in receiving equipment was as important as that of consumers of electricity, and also invoked an analogy between the regulation of public utilities and public broadcasters, 359 F 2d at 1002-1003, concluding that the listeners not only had standing to challenge administrative action, but a right to a hearing of their views on the subject. Other authorities are in agreement, especially with reference to utility rate changes: "Public utilities enjoy monopolies and they are privileged to exact rates established by agencies set up by law. Consumers of the products of such utilities have the undoubted right to assert that they are adversely affected by rates so promulgated". *Terre Haute Gas Corp. v. Johnson*, (Ind. 1942) 45 NE 2d 484, 487.

Is a Consumer Entitled to Notice and an Opportunity to Be Heard on Proposed Rate Increases If He Has a Constitutionally Protected Interest?

If the interest or entitlement to participate in the rate-making process is protected by the Fourteenth Amendment then petitioners and other consumers should be entitled to

at least the rudiments of procedural due process, that is specific notice to affected parties and an opportunity for some kind of hearing before the rate goes into effect. Such a view is not only consistent with the views expressed in *Fuentes*, *Board of Regents*, *Bell*, and so forth, but also in broad rules announced by this Court in 1937 with specific regard to state public utility regulatory bodies. Where the power of administrative discretion in rate-making is freely bestowed upon such bodies, the right to a fair and open hearing is a rudiment of fair play assured to every litigant by the Fourteenth Amendment as a minimal requirement. *Ohio Bell Tel. Co. v. Public Utilities Comm.*, 301 U.S. 292, 304-5. And of course, "[a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections [Citations omitted]. The notice must be of such nature as reasonably to convey the required information [citation omitted], and it must afford a reasonable time for those interested to make their appearance. . . ." And when such notice is due a person, "process which is a mere gesture is not due process." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314-315.

The courts have said "that the public is vitally interested in all regulations of administrative boards fixing prices for services or commodities and that such notice and hearing must be given the public in strict compliance with the law. *The law must require notice and give opportunity to be heard; it is not enough that the public get it by chance.* Otherwise the requirements of due process fail." (Emphasis added). *Robbins v. Webb's Cut Rate Drug Co.*, (Fla. Sup. Ct. en banc 1943) 16 So 2d 121, 122. And despite the fail-

ure of utility regulatory statutes to provide for notice and hearing on rate changes, the courts have held that the legislature could not authorize an agency "to issue orders affecting the rights of citizens without giving citizens an opportunity to be heard. A legislative act purporting to confer such power would be clearly invalid. It would contain no standard for its application or any procedural limitations upon its exercise. If construed literally it would confer an arbitrary unlimited power". *Wisconsin Tel. Co. v. Public Serv. Comm.*, (Wis. Sup. Ct. 1939) 287 NW 122, 133, cert den. 309 U.S. 657.

Mullane pointed out that chance reading of an advertisement in a newspaper is hardly sufficiency of notice; that when notice was due a person affected by some proceeding, then notice which is a "mere gesture is not due process"; and the means of notice employed to inform must be reasonably calculated to accomplish this task. 339 U.S. at 315. As noted in the dissent in the Missouri court (532 SW 2d at 35) no notice was given by the PSC to any affected party of the utility's filing, but was made known only thanks to a chance sighting of the same in a news story by one of petitioners' lawyers.

Although questions of allowing rates to go into effect without a prior hearing have been considered in such cases as *Holt v. Yonce*, (S.C. 1973) 370 F. Supp. 374, aff'd without opinion 415 U.S. 969, and *Sellers v. Iowa Power & Light Co.*, (S.D. Iowa 1974) 372 F. Supp. 1169, the questions posed here were not decided therein. Those decisions (one of which, *Sellers*, was heavily relied upon by the Missouri Supreme Court) construed statutory provisions which: (1) allowed the consumer a right to a refund of excessive rates collected from him; (2) required the utility to post a refund bond with the commission, which undertaking the commission had to approve, before the increased rate could

be charged; and (3) required a hearing on the reasonableness of the increase *before* the new rates could become final. In effect it was determined that these safeguards could serve to take the place of the prior hearing requirement probably for the reason that the procedure equally allowed both the utility and consumer to mitigate their respective losses and also allowed for a meaningful hearing before finality. See *Sellers*, *supra*, 372 F. Supp. at 1173.

But no such safeguards are present in 393.140 (11) or in any other provisions of the Missouri utilities law as were in effect in *Sellers* and *Holt*, in fact Missouri law is to the contrary because no refunds are allowed and no refund bonds required. No notice or hearing on the proposed increase is required before the rate is allowed to go into effect, and no hearing required for final approval, because the rate becomes final when it goes into effect. So the safeguards present to protect the consumer in *Sellers* and *Holt* are completely absent here.

Nor were the issues raised here considered in *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, which turned on the fact that state regulatory agencies had historically been indifferent to utilities' termination of service provisos in rate schedules. That activity had been virtually left untouched by state regulation. In the Court's words: "[t]he Commission has not put its own weight on the side of the proposed practice by ordering it." *Id.*, at 357. Rate making is an activity in which the PSC is heavily involved. The rates that consumers were defending in this case were rates established by the state in a previous rate proceeding. In addition, the action complained of in *Jackson* was the action of the utility in cutting off service. The action complained of here is the denial by the state of a state-created right to reasonable rates to parties entitled to that right

through the procedure which the state has ostensibly adopted for the preservation and protection of that right.

(II) Is a Utility Regulatory Scheme Which Places a Significantly Heavier Burden Upon a Consumer Who Challenges Agency Action Than It Places Upon the Utility to Challenge Comparable Agency Action a Denial of Equal Protection?

When the Public Service Commission sets a rate, it is presumed to be just and reasonable to both utility and customer and acquires the force of law. It is conclusively presumed to be just and reasonable in any proceeding in the state courts other than in a direct appeal from the order setting it. It cannot be collaterally attacked.

The law of Missouri permits the rate, which has the same force as an act of the legislature, to be changed at the instance of a utility by the mere filing of a tariff, 393.150. This tariff is not verified, and contains no allegation that existing rates are unreasonable. It is merely a price list of what the utility would like to charge. Upon the filing of such a tariff by the utility the Commission is free to institute new prices without notice to affected customers and without affording them any opportunity to be heard. While Missouri law provides that a party seeking to change an order of the Commission must bear the burden of proving the order unreasonable, a utility may obtain a change without supplying any evidence at all. Finally there is no right of appeal from this utility instituted procedure. All of this may happen without any showing of an emergency warranting abbreviated procedures.

A customer who wishes to challenge the same rate must either act in concert with 24 other customers or get an elected official to file a complaint on his behalf, 393.260.

He must make specific allegations and notify the affected utility. A hearing is required at which the customer must bear the burden of proving the rate unreasonable. A right to appeal the decisions of the Commission is granted to the affected utility.

In addition if the Commission allows an increase in the rates under the procedure available to the company a shift in the burden of proof as it relates to the originally approved rates results. Not only has the company been relieved of the burden of proving that the previously approved rates are unreasonable and that its proposed rates are reasonable, but because the new rates become Commission approved rates at any hearing provided for under state law on these rates after they have become effective. The burden is not on the company to prove their reasonableness but rather it is upon the consumer to prove that they are unreasonable.

It is an insufficient justification for these vastly different procedures to say that at common law utilities could establish any price. Utility regulation has given utility rates the status of law, a status that they did not enjoy at common law. In addition state regulation has deprived customers of the opportunity to be served by competing electric companies and it further deprived them of the right to negotiate individual contracts with utilities. Finally utility rates insofar as they represent an allocation of allowable costs among different classes of consumers do more than establish a relationship between consumers and utility, they establish an equally important relationship between different classes of consumers.

CONCLUSION

For the reasons stated the petition for a writ of certiorari should be granted.

Respectfully submitted,

STANLEY CHRISTOPHER
Deputy County Counselor

RUSSELL D. JACOBSON
Associate County Counselor

JEREMIAH D. FINNEGAN
Special County Counselor

WILLARD B. BUNCH
County Counselor
Rm. 701-M

Jackson County Courthouse
415 East 12th Street
Kansas City, Mo. 64106

*Attorneys for Petitioner,
Jackson County, Missouri*

CARROL C. KENNETT
Assistant City Attorney

City Hall
414 East 12th Street
Kansas City, Mo. 64106
*Attorney for Petitioner,
Kansas City, Missouri*

WILLIAM M. BARVICK
911A Leslie
Jefferson City, Mo. 65101

*Attorney for Petitioner,
Office of Public Counsel*

APPENDIX**APPENDIX A****Constitutional And Statutory Provisions Involved**

Section 1, Amendment XIV of the U.S. Constitution provides, in pertinent part:

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Subs. 1 & 3, Section 393.130, R.S. Mo. (1969) provide, in pertinent part:

"1. * * * All charges made or demanded by any . . . electrical corporation . . . for electricity . . . or any service rendered or to be rendered shall be just and reasonable and not more than allowed by law or by order or decision of the commission. Every unjust or unreasonable charge made or demanded for . . . electricity . . . or any such service, or in connection therewith, or in excess of that allowed by law or by order or decision of the commission is prohibited.

* * *

3. No gas corporation . . . shall make or grant any undue or unreasonable preference or advantage to any person, corporation or locality, or to any par-

ticular description of service in any respect whatsoever, or subject any particular person, corporation or locality or any particular description of service to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

Subdivision (11), Section 393.140, R.S. Mo. (1969) provides, in pertinent part:

"Unless the commission otherwise orders, no change shall be made in any rate or charge, or in any form of contract or agreement, or any rule or regulation relating to any rate, charge or service, or in any general privilege or facility, which shall have been filed and published by a . . . electrical corporation . . . in compliance with an order or decision of the commission, except after thirty days' notice to the commission and publication for thirty days as required by order of the commission, which shall plainly state the changes proposed to be made in the schedule then in force and the time when the change will go into effect. The commission for good cause shown may allow changes without requiring the thirty days' notice under such conditions as it may prescribe."

Subs. 1, Section 393.150, R.S. Mo. (1969) provides, in pertinent part:

"1. Whenever there shall be filed with the commission by any . . . electrical corporation . . . any schedule stating a new rate or charge, or any new form of contract or agreement, or any new rule, regulation or practice relating to any rate, charge or service or to any general privilege or facility, the commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without an-

swer or other formal pleading by the interested . . . electrical corporation . . . but upon reasonable notice, to enter upon a hearing concerning the propriety of such rate, charge, form of contract or agreement, rule, regulation or practice, and pending such hearing and the decision thereon, the commission upon filing with such schedule, and delivering to the . . . electrical corporation . . . affected thereby, a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, form of contract or agreement, rule, regulation or practice, but not for a longer period than one hundred and twenty days beyond the time when such rate, charge, form of contract or agreement, rule, regulation or practice would otherwise go into effect; and after full hearing, whether completed before or after the rate, charge, form of contract or agreement, rule, regulation or practice goes into effect, the commission may make such order in reference to such rate, charge, form of contract or agreement, rule, regulation or practice as would be proper in a proceeding initiated after the rate, charge, form of contract or agreement, rule, regulation or practice had become effective."

* * *

Subs. 1, Section 393.260, R.S. Mo. (1969) provides, in pertinent part:

"1. Upon the complaint in writing of the mayor or the president or chairman of the board of aldermen, or a majority of the council, commission or other legislative body of any city, town, village or county within which the alleged violation occurred, or by not less than twenty-five consumers or purchasers, or prospective consumers or purchasers of such . . . electricity . . . as to the . . . price of electricity sold and delivered in

such municipality, . . . the commission shall investigate as to the cause of such complaint."

Subs. 1 & 2, Section 393.270, R.S. Mo. (1969) provide, in pertinent parts:

"1. Before proceeding under a complaint presented as provided in sections 393.110 to 393.285, the commission shall cause notice of such complaint, and the purpose thereof, to be served upon the person or corporation affected thereby. Such person or corporation shall have an opportunity to be heard in respect to the matters complained of at a time and place to be specified in such notice. An investigation may be instituted by the commission as to any matter of which complaint may be made as provided in sections 393.110 to 393.285, or to enable it to ascertain the facts requisite to the exercise of any power conferred upon it.

2. After a hearing and after such investigation as shall have been made by the commission . . . the commission within lawful limits may, by order, fix the maximum price of . . . electricity . . . exceeding that fixed by statute to be charged by such corporation or person, for the service to be furnished."

Section 393.280, R.S. Mo. (1969) provides:

"If it be alleged and established in an action brought in any court for the collection of any charge for gas . . . service that a price has been demanded in excess of that fixed by the commission or by statute, in the municipality wherein the action arose, no recovery shall be had therein, but the fact that such excessive charges have been made shall be a complete defense to such action."

APPENDIX B

Opinion, In Part, Of The Circuit Court Of Jackson County, Missouri

IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI

Case No. CV75-2384

**STATE OF MISSOURI ex rel. Jackson County, Missouri
and Kansas City, Missouri,**

Relators,

vs.

**PUBLIC SERVICE COMMISSION OF MISSOURI,
Respondent,**

and

**MISSOURI PUBLIC SERVICE COMPANY,
Intervenor.**

MEMORANDUM OPINION AND JOURNAL ENTRY

Relators seek judicial review of the report and order of respondent commission under Sec. 386.510 and 386.520 V.A.M.S. The report and order in PSC No. 18,180 increased the rates which could be charged by Missouri Public Service Company ("MPS"). This electric utility company has been allowed to intervene in this proceeding.

Simultaneously with their petition for writ of review, relators filed their "Joint Motion for Immediate Reversal, Stay Injunction or Impoundment of Funds." Relators, respondent, and intervenor appeared by their respective attorneys together with Public Counsel for respondent on Thursday, July 17, 1975. This motion and intervenor's motion to dismiss both the writ and relators' motion were

taken up, fully heard and considered together with statements and arguments of counsel and evidence adduced.

The principal motion and its converse were taken under advisement for early determination. This Court has now determined that part of the relief prayed by relators should be granted and the writ of review quashed.

Relators' attack upon the report and order of respondent is three-fold. The points are discussed under the headings which they have used.

* * *

Respondent exceeded its power in entering the challenged report and order prior to the expiration of the two years from December 24, 1973. Still another infirmity is urged by relators in this connection.

The proceedings which resulted in the report and order under scrutiny were initiated by the filing by MPS of revised rate schedules. The exclusive procedures under Sec. 393.270 V.A.M.S. are respondent's own motion or complaint of an interested party. It follows that the proceedings and resulting report and order were and are a nullity. This is true even if the two year "freeze" or moratorium is disregarded.

* * *

WHEREFORE, IT IS ORDERED, ADJUDGED AND DECREED BY THE COURT:

1. The report and order of respondent in its No. 18,180 is reversed for noncompliance with Section 393.270 V.A.M.S.

* * *

/s/ JAMES A. MOORE
Judge

Dated: July 22, 1975

APPENDIX C

**Opinion Of The Supreme Court Of Missouri En Banc,
Officially Reported At 532 S.W.2d 20**

STATE ex rel. JACKSON COUNTY,
Missouri, and Kansas City, Missouri,
Relators-Respondents,
Office of Public Counsel,
Intervenor-Relator,

v.

PUBLIC SERVICE COMMISSION of
Missouri, Respondent-Appellant,
Missouri Public Service Company,
Intervenor-Respondent-Appellant.

No. 59171.

Supreme Court of Missouri,
En Banc.

Dec. 22, 1975.

Dissenting Opinion on Denial of
Rehearing Feb. 9, 1976.

Reversed and remanded.

Bardgett, J., filed an opinion concurring in the result.

Seiler, C. J., dissented and filed a dissenting opinion
on denial of rehearing.

MORGAN, Judge.

On June 13, 1975, the Public Service Commission of
Missouri (herein referred to as the Commission) issued its

Report and Order in Case No. 18,180 authorizing the Missouri Public Service Company (herein referred to as the Company) to increase its electric rates on July 1, 1975, to provide \$5,593,000. in additional annual revenues. Applications for rehearing were filed by all parties to the proceeding, which were denied without further hearing on July 8, 1975. On July 11, 1975, the city of Kansas City and the county of Jackson (herein referred to as the Consumers) filed a joint petition in the trial court for a Writ of Review pursuant to §§ 386.510 and 386.520 (all statutory references herein being to RSMo 1969, V.A.M.S.) and a joint Motion for Immediate Reversal, Stay, Injunction or Impoundment of Funds. The Company filed a motion seeking dismissal of both the petition and motion. On July 17, 1975, the trial court, before the certified record of the proceedings before the Commission were before it, held hearings on the two motions. Thereafter, the Company's motion to dismiss was overruled and that of the Consumers for "immediate relief" was sustained by judgment entry, which, in part, provided:

1. The report and order of respondent in its No. 18,180 is reversed for noncompliance with Section 393.270, V.A.M.S.
2. Alternatively said report and order is reversed and the proceeding remanded to respondent for consideration and determination of relators' application for rehearing in compliance with Sections 386.130 and 536.080, V.A.M.S.
3. The relief granted in the preceding paragraph two shall be effective only in the event that an appellate court should prohibit the relief granted in paragraph one.
4. The writ of review or certiorari is quashed.

Pursuant to Supreme Court Rule 81.06, the trial court declared the same to be a final appealable judgment, and stayed the enforcement thereof if the Company posted bond in the amount of \$5,600,000. Since appeal, briefs have been filed (including that of other utility companies as Amici Curiae), and oral arguments made by all concerned (including the "Public Counsel").

It is necessary to relate some of the history behind the present litigation, most of which is outlined in footnote No. (1).¹ Of immediate concern, however, is that part occurring

1. August 5, 1974—Appellant filed revised tariffs and rules and regulations requesting increased rates for electric service to its Missouri customers. This was eventually designated Commission Case No. 18,180.

August 15-21, 1974—Commission counsel, Acting Public Counsel, Jackson County and Kansas City filed Motions to Dismiss the August 5, 1974, tariffs filed by Appellant premised upon the two-year "moratorium."

August 21, 1974—The Commission issued its Order setting hearing and briefs to be filed in Case No. 17,763 and later changed the case designation to Case No. 18,174.

August 27, 1974—A hearing was held on the four motions filed praying for the dismissal of the electric tariffs filed by Appellant on August 5, 1974, before the Commission. During the hearing, evidence was submitted to the Commission indicating circumstances which had changed in the Appellant's operations since the Commission's Order of December 14, 1973.

September 3, 1974—The Commission, after having designated the electric filing of August 4, 1974, of Appellant as Case No. 18,180, issued a Suspension Order suspending until January 2, 1975, the requested effective date of the tariffs.

September 3, 1974—Jackson County, Missouri, filed its Petition for Injunction, Temporary Injunction, Temporary Restraining Order and Preliminary Mandatory Injunction in the Jackson County Circuit Court presided over by the Honorable J. Donald Murphy, Circuit Judge.

September 6, 1974—The Commission issued its Order in Case No. 18,174 wherein it overruled the Motions to Dismiss Appellant's tariffs.

September 10, 1974—The Honorable J. Donald Murphy of the Circuit Court of Jackson County issued his opinion in the injunction action generally dismissing the cause filed by Jackson County, Missouri, finding, in part, after arguments and briefs had been

(Continued on following page)

on December 14, 1973. On that date, the Commission issued its Report and Order in Case No. 17,763 which was the proceeding wherein the Company was last granted a tariff increase, prior to its request in No. 18,180—the present case. Therein, the Commission stated:

Footnote continued—

heard and submitted, that the moratorium as applied to Appellant, under the then existing circumstances, was unconstitutional and in violation of Article I, Section 10 of the Constitution of the State of Missouri and of the Fifth and Fourteenth Amendments to the United States Constitution. Circuit Court Case No. 783,082 (Exhibit 8).

September 26, 1974—Jackson County, Missouri, filed a Complaint against the Commission requesting an order of the Commission directing that the schedules of increased rates transmitted to the Commission on August 5, 1974, be stricken from the files of the Commission. This Complaint was designated as Commission Case No. 18,193.

October 8, 1974—Jackson County, Missouri, filed its Motion to Dismiss the schedules of increased rates received by the Commission August 5, 1974, in Case No. 18,180.

November 26, 1974—Jackson County, Missouri, filed in Case No. 18,193 its Motion for Immediate Relief waiving hearing and oral argument and requesting a determination of the matter. The Commission subsequently dismissed this complaint from which Jackson County filed a Petition for Writ of Review in the Circuit Court of Cole County, Missouri. (That Petition for Writ of Review was subsequently denied by the Circuit Court of Cole County, Missouri, on June 10, 1975, after briefs and arguments had been submitted to the Court.) Jackson County did not appeal the decision of the Circuit Court of Cole County. Cole County Circuit Court Case No. 27,539 (Division 1).

December 18, 1974—The Commission issued its Order denying the Motions to Dismiss in Case No. 18,180, stating that in effect the exact issues had already been ruled upon in the case numbered 18,174 and incorporating the reasoning therefor used in Case No. 18,174 which had found that the applicant, Missouri Public Service Company, had adduced sufficient evidence to establish a prima facie showing of substantial and altered circumstances.

December 30, 1974—The Commission issued its Suspension Order No. 2 in Case No. 18,180 extending the suspension of tariff revisions from January 2, 1975, to July 2, 1975. Beginning April 21, 1975, and continuing on April 22, 23, 24, 25, 28, 29, 30 and May 1, 2, 5 and 6 of 1975, evidentiary hearings were held before the Commission on Appellant's rate increase request. Briefs were filed by Appellant, Commission Counsel, Public Counsel of Missouri and Relators on June 3, 1975. Oral argument by all parties was heard by the Commission on June 5, 1975.

Based upon a thorough analysis of the updated and projected test year presented in this case, the Commission concludes that it should not entertain a request by the applicant for any further additional rate relief from its electric customers for a period of at least two years after the effective date of this Order, inasmuch as the Commission is of the opinion that a substantial portion of the applicant's certified area can be reasonably expected to expand and develop so as to favorably affect the Company's revenue growth and minimize the need for additional rate relief. Furthermore, the record requires the Commission to conclude that this anticipated growth should not require significant capital investments and generating capacity. Applicant's costly Sibley generating plant was constructed in anticipation of this reasonably expected growth and the Commission is of the opinion that under good management practices, applicant should not require significant additional generating capacity and the high financing costs associated therewith.

Premised thereon, the Commission provided in "Order 3" of its Report and Order (in No. 17,763) as follows:

3. That the prices, charges, rates and tariffs filed herein shall be the maximum to be charged by Missouri Public Service Company for electric service to be furnished within its territory *for a period of at least two years from the effective date of this Order except in the case of sliding scales and automatic adjustments as heretofore or hereafter approved by this Commission pursuant to § 393.270, ¶ 3, R.S.Mo.1969. (Emphasis added.)*

It seems agreed that the parties involved did not address the "moratorium" issue during the hearing and pro-

ceedings in No. 17,763. Apparently it was supplied by the Commission on its own without the knowledge of any of the parties prior to entry thereof. In any event, there was no appeal. However, the significance thereof and its relevancy, if any, to the instant appeal will be considered in turn.

In their joint motion, the Consumers challenged the Commission Order in No. 18,180 by asserting that:

1. The Commission did not have authority to "change or abrogate" the moratorium of two years previously ordered (referred to by some of the parties as a "period of repose").

2. The Commission erroneously failed to base the now challenged rate schedule on a test year, i. e., actual experience reference income and expenses; but, in fact, utilized a year composed of eight months actual experience and four months estimated or projected income and expense.

3. The Commission denied the Consumers' application for a rehearing in violation of § 386.130, which requires, in part, that a "... majority of the commissioners shall constitute a quorum ..." when the denial thereof was made by a lesser number.

4. The rate increase authorized by the Commission was initiated by the "file and suspend" method (§ 393.140 (11)) and is a nullity, because a rate increase can only be considered under the "complaint" method (§§ 386.390—393.260, 393.270).

We first consider the last point (No. 4) for the reason the other three become somewhat moot if the Consumers' contention therein is well founded.

Necessarily, some portions of the many statutes involved must be quoted.

Section 393.140(11): Have power to require every gas corporation, electrical corporation, water corporation, and sewer corporation to file with the commission and to print and keep open to public inspection schedules showing all rates and charges made, established or enforced or to be charged or enforced, all forms of contract or agreement and all rules and regulations relating to rates, charges or service used or to be used, and all general privileges and facilities granted or allowed by such gas corporation, electrical corporation, water corporation or sewer corporation; but this subdivision shall not apply to state, municipal or federal contracts. *Unless the commission otherwise orders, no change shall be made in any rate or charge, or in any form of contract or agreement, or any rule or regulation relating to any rate, charge or service, or in any general privilege or facility, which shall have been filed and published by a gas corporation, electrical corporation, water corporation, or sewer corporation compliance with an order or decision of the commission, except after thirty days' notice to the commission and publication for thirty days as required by order of the commission, which shall plainly state the changes proposed to be made in the schedule then in force and the time when the change will go into effect. The commission for good cause shown may allow changes without requiring the thirty days' notice under such conditions as it may prescribe.* No corporation shall charge, demand, collect or receive a greater or less or different compensation for any service rendered or to be rendered than the rates and charges applicable to such services as specified in its schedule filed and in effect at the time; nor shall any corporation refund or remit in any manner or by any device any portion of the rates or charges so specified, nor to extend to any per-

son or corporation any form of contract or agreement, or any rule or regulation, or any privilege or facility, except such as are regularly and uniformly extended to all persons and corporations under like circumstances. The commission shall have power to prescribe the form of every such schedule, and from time to time prescribe by order such changes in the form thereof as may be deemed wise. The commission shall also have power to establish such rules and regulations, to carry into effect the provisions of this subdivision, as it may deem necessary, and to modify and amend such rules or regulations from time to time. (Emphasis added.)

Section 393.150. 1. Whenever there shall be filed with the commission by any gas corporation, electrical corporation, water corporation or sewer corporation *any schedule stating a new rate or charge*, or any new form of contract or agreement, or any new rule, regulation or practice relating to any rate, charge or service or to any general privilege or facility, *the commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint*, at once, and if it so orders without answer or other formal pleading by the interested gas corporation, electrical corporation, water corporation or sewer corporation, but upon reasonable notice, to *enter upon a hearing concerning the propriety of such rate, charge, form of contract or agreement, rule, regulation or practice*, and pending such hearing and the decision thereon, the commission upon filing with such schedule, and delivering to the gas corporation, electrical corporation, water corporation or sewer corporation affected thereby, a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate,

charge, form of contract or agreement, rule, regulation or practice, but not for a longer period than one hundred and twenty days beyond the time when such rate, charge, form of contract or agreement, rule, regulation or practice would otherwise go into effect; and after full hearing, whether completed before or after the rate, charge, form of contract or agreement, rule, regulation or practice goes into effect, the commission may make such order in reference to such rate, charge, form of contract or agreement, rule, regulation or practice as would be proper in a proceeding initiated after the rate, charge, form of contract or agreement, rule, regulation or practice had become effective.

2. If any such hearing cannot be concluded within the period of suspension, as above stated, the commission may, in its discretion, extend the time of suspension for a further period not exceeding six months. At any hearing involving a rate sought to be increased, the burden of proof to show that the increased rate or proposed increased rate is just and reasonable shall be upon the gas corporation, electrical corporation, water corporation or sewer corporation, and the commission shall give to the hearing and decision of such question preference over all other questions pending before it and decide the same as speedily as possible. (As amended Laws 1967, p. 578, § 1.) (Emphasis added.)

As emphasized in § 393.150, which details the procedure for handling the "file" method, it is quite obvious that the word "complaint" is also found therein. It would not be too unreasonable, therefore, to conclude that much of the confusion is caused by the use of the word both in its normal meaning as a mere "objection" and also as a

word descriptive of a specific "procedure" throughout the statutory scheme.

Section 393.270(3): The price fixed by the commission under sections 393.110 to 393.285 shall be the maximum price to be charged by such corporation or person for gas, electricity or water for the service to be furnished within the territory and for a period to be fixed by the commission in the order, not exceeding three years, except in the case of a sliding scale, and *thereafter until the commission shall, upon its own motion or upon the complaint of any corporation or person interested, fix a higher or lower maximum price of gas, electricity, water or sewer service to be thereafter charged.* (Emphasis added.)

The last quoted section is that upon which the trial court apparently concluded that rate increases must be sought under the "complaint" method instead of under the "file and suspend" method found, generally, in § 393.140. The basic statutes concerning "complaints" are:

Section 386.390: 1. Complaint may be made by the commission of its own motion, or by any corporation or person, chamber of commerce, board of trade, or any civic, commercial, mercantile, traffic, agricultural or manufacturing association or organization, or any body politic or municipal corporation, by petition or complaint in writing, setting forth any act or thing done or omitted to be done by any corporation, person or public utility, including any rule, regulation or charge heretofore established or fixed by or for any corporation, person or public utility, in violation, or claimed to be in violation, of any provision of law, or of any rule or order or decision of the commission; *provided, that no complaint shall be entertained by*

the commission, except upon its own motion, as to the reasonableness of any rates or charges of any gas, electrical, water, sewer, or telephone corporation, unless the same be signed by the mayor or the president or chairman of the board of aldermen or a majority of the council, commission or other legislative body of any city, town, village or county, within which the alleged violation occurred, or not less than twenty-five consumers or purchasers, or prospective consumers or purchasers, of such gas, electricity, water, sewer or telephone service.

2. All matters upon which complaint may be founded may be joined in one hearing, and no motion shall be entertained against a complaint for misjoinder of causes of action or grievances or misjoinder or nonjoinder of parties; and in any review by the courts of orders or decisions of the commission the same rule shall apply with regard to the joinder of causes and parties as herein provided.

3. The commission shall not be required to dismiss any complaint because of the absence of direct damage to the complainant. Upon the filing of a complaint, the commission shall cause a copy thereof to be served upon the corporation or person complained of.

4. Service in all hearings, investigations and proceedings pending before the commission may be made upon any person upon whom summons may be served in accordance with the provisions of the code of civil procedure of this state, and may be made personally or by mailing in a sealed envelope with postage prepaid.

5. The commission shall fix the time when and the place where a hearing will be had upon the complaint and shall serve notice thereof, not less than ten days

before the time set for such hearing, unless the commission shall find that the public necessity requires that such hearing be held at an earlier date. (As amended Laws 1967, p. 578, § 1.) (Emphasis added.)

Section 393.260(1) contains language similar to that found in § 386.390(1), to-wit:

Upon the complaint in writing of the mayor or the president or chairman of the board of aldermen, or a majority of the council, commission or other legislative body of any city, town, village or county within which the alleged violation occurred, or by not less than twenty-five consumers or purchasers, or prospective consumers or purchasers of such gas, electricity, water or sewer, as to the illuminating power, purity, pressure or price of gas, the efficiency of the electric incandescent lamp supply, the voltage of the current supplied for light, heat or power, or price of electricity sold and delivered in such municipality, or the purity, pressure or price of water or the adequacy, sanitation or price of sewer service, the commission shall investigate as to the cause of such complaint.

Section 393.270(1) requires that the Commission "shall cause notice of such complaint, and the purpose thereof, to be served upon the person or corporation affected thereby", which is similar to the provision found in § 386.390(3), *supra*.

Many of the arguments made revolve around the effect of § 386.400, which provides:

Any corporation, person or *public utility* shall have the right to complain on any of the grounds upon which complaints are allowed to be filed by other parties, and the same procedure shall be adopted and followed as

in other cases, except that the complaint may be heard *ex parte* by the commission or may be served upon any parties designated by the commission. (Emphasis added.)

Prior to detailing the manner in which the parties construe the effect of § 386.400 upon § 386.390, we make this observation as to the crucial issue, for some hoped-for simplicity of reading. Section 386.390, heretofore quoted, prior to the *exception* therein allows for complaints to be filed against utility companies. The exception therein pertains specifically to *rates* and limits those who may complain to governmental bodies through the "mayor," "president or chairman of the board of aldermen," a "majority of the council, commission or other legislative body" of any city, town, village or county or "twenty-five consumers." With no effort toward over-simplification, the question may be posed—did § 386.400 place a public utility only within those listed generally in § 386.390 that might complain or were they also added to those allowed to complain as to "rates" in the "exception," i. e., public governmental units and consumers (25 or more)?

The brief of other utilities and the Company, attacking the judgment entered, are similar; and, because of the many cross-references to statutes therein, we quote the following therefrom:

Subsection 3 of the same statute [§ 393.260] provides that the Commission shall prescribe the form and contents of the complaints, and requires that same "shall be signed by the officers, or by the customers, purchasers or subscribers making them, who must add to their signatures their places of residence, by street and number, if any."

Both Sections 386.390(3), set forth supra, and 393.270 (1) require the Commission to serve notice of a complaint upon the person or corporation complained of or affected thereby. Similar language is likewise contained in Section 386.420(1), relating to how hearings are to be conducted before the Commission. Had the Legislature intended that gas, electric, water and sewer utilities file complaints with the Commission to initiate rate cases, there clearly would be no need for such corporation to serve itself with notice thereof. A statute should not be given a construction which would cause such an absurd result. *State ex rel. Dravo Corporation v. Spradling*, 515 S.W.2d 512 (Mo.1974).

The conclusion of the lower court that Section 393.270 (3) provides the exclusive means (i. e., a complaint or upon the Commission's own motion) for utilities to initiate rate increase proceedings ignores the fact that Sections 386.390 and 393.260 make absolutely no mention of the Commission's entertaining a complaint by a public utility as to the reasonableness of its own rates; thus, *expressio unius est exclusio alterius*. *Giloti v. Hamm-Singer Corporation*, 396 S.W.2d 711 (Mo. 1965). Section 386.400 purports to give utilities generally "the right to complain on any of the grounds upon which complaints are allowed to be filed by other parties", but this does not include the right of a utility to file a complaint against its own rates, because Sections 386.390 and 393.260 specifically enumerate the parties qualified to file a complaint as to the reasonableness of a utility's rates and charges, and utilities are not among them. It is obvious from a reading of Sections 386.390 and 393.260 that they speak in terms of particulars while Section 386.400 is couched in general language. Where general terms or expressions in

one part of a statute are inconsistent with more specific provisions in another part thereof, the specific provisions must govern. *Terminal Railroad Association of St. Louis v. City of Brentwood* [360 Mo. 777], 230 S.W.2d 768 (Mo.1950).

Section 386.400 was thus only intended to give public utilities the right to file complaints on matters other than as to the reasonableness of their rates. This is the only manner in which these two separate statutes dealing with the same subject matter can be harmonized and force given to the provisions of each. *State ex rel. Chicago, Rock Island and Pacific Railroad Company v. Public Service Commission*, 441 S.W.2d 742 (Mo.App.1969).

* * *

Missouri statutes are barren of any procedural guidance for the Commission should it ever entertain a "complaint" by a utility as to its own rates if filed under Section 393.270(3).

In contrast, the Consumers argue that although there is, in fact, a file and suspend method of raising rates, it was not available under the factual setting involved herein. They contend that "... there are two statutory ways to increase electric rates in Missouri but such methods are not optional with the utility or the Public Service Commission"; and, the statutes cover separate situations, i. e.,

1. Where there is a statute or order of the Commission fixing maximum rates—by order of the Commission, after hearing, on its own motion or upon complaint. Section 393.270(3).
2. Where there is no statute or order of the Commission fixing maximum rates—by the filing of tariff

schedules, which may or may not be suspended. Sections 393.140(11) and 393.150.

Recognition is then given to *May Department Stores Co. v. Union Electric Co.*, 341 Mo. 299, 107 S.W.2d 41 (1937), wherein the court said: "The [Commission] has exclusive jurisdiction to establish public utility rates and may do so either by approval of rate schedules filed with it or by order after investigation or hearing." Consumers construe that statement to mean approval of alternative methods, although it is not clear if the "hearing" referred to was in reference to one possibly held in connection with the new rate filing or was a reference to a hearing under the complaint method. In other words, it is the position of Consumers that the "file" method can also be used by utilities whose rates had been set previously by the "file" method, but not in those instances where the Commission had had an earlier hearing in which it fixed the rate by Order. That is apparently the position adopted by New York, under statutes similar in relevant aspects to those in Missouri in *In Re Dry Dock, East Broadway & Battery R. Co.*, 254 N.Y. 305, 172 N.E. 516 (1930). See also *City of New York v. Brooklyn Edison Co., Inc.*, 189 N.Y.S. 312 (Sup.Ct.1921). Nothing could be gained by further exploring the question through foreign precedents because the experience in Missouri now covers over sixty years and the "file" method has been accepted and consistently used throughout that time—absent the precise attack now made.

Somewhat in conclusion, we make our own observation. Section 393.270(3), by its terms, applies to a "price fixed by the commission under sections 393.110 to 393.285." A price fixed by the file and suspend method—§ 393.140—falls within the classification noted. This court has so held. In *State ex rel. St. Louis County Gas Co. v. Public Service Commission*, 315 Mo. 312, 317, 286 S.W. 84, 86 (1926), it

was said: "A schedule of rates and charges filed and published in accordance with the foregoing provisions [now § 393.140(11), the file and suspend statute] acquires the force and effect of law." In *May Department Stores Co. v. Union Electric Co.*, supra, this court held: "These provisions mean that a public utility may by filing schedules suggest to the commission rates and classifications which it believes are just and reasonable, and, if the commission accepts them, they are authorized rates, but the commission alone can determine that question and make them a lawful charge." In 64 Am.Jur.2d, Public Utilities, § 244, the general statement is made that: "Public utility rates filed pursuant to statute with a public service commission, or promulgated by order of the commission in accordance with the statute, have the same force and effect as if directly prescribed by the legislature." Of significance is the fact a "hearing" is proper under the file and suspend method as provided in § 393.150. See also: *Marty v. Kansas City Light & Power Co.*, 303 Mo. 233, 259 S.W. 793 (1924); and, *State ex rel. Hotel Continental v. Burton*, 334 S.W.2d 75 (Mo. 1960).

[1, 2] From all of the arguments made, it is apparent that this court through the years has not read § 393.270(3), and its related sections, literally. It has recognized that all of the statutes reference rates and charges must be read and interpreted with reference to the others. To do otherwise would produce a conflict between the statutes noted. When read together there is ambiguity, and we look to the construction which those assigned by law to administer those provisions have placed on them. *Foremost-McKesson, Inc. v. Davis*, 488 S.W.2d 193 (Mo. banc 1972). All parties and the trial court have recognized that the Commission, since its establishment many years ago, has accepted the "file and suspend" method as proper for proposed rate changes.

In addition, the General Assembly (of which the Commission is an arm) as recently as 1967 amended these very statutes creating the present controversy. That those of immediate concern remained essentially the same is indicative of the fact that they are being interpreted by the Commission as intended by the General Assembly. In light of the fact that such approval has now extended over sixty years, and any contrary finding necessarily would be premised on the obviously ambiguous statutory provisions noted, a court should refrain from substituting a new and novel interpretation thereof. Either procedure authorizes and, in fact, contemplates that the Commission will protect not only the rights of the consuming public but also the financial integrity of the utilities—by public hearings, where proper.

[3] The trial court erred when it reversed the Report and Order in No. 18,180 for failure of the Commission to proceed under § 393.270.

Prior to giving consideration to the remaining three points (Nos. 1, 2, 3) in the joint motion of the Consumers, we do mention that the trial court ruled on each in a "Memorandum Opinion & Journal Entry" which was incorporated by reference in the "Judgment Entry" heretofore set out.

Point 1: The Consumers contend that the Commission, once having declared a two-year moratorium on further rate increases as authorized by § 393.270(3), cannot change or abrogate that order.

The parties have not called to our attention, nor have we found, any case in Missouri where the question was considered. The reason perhaps is obvious, because it has been suggested that this case constitutes the first time the Commission has made such an order of repose. In any

event, we find no statute specifically resolving the issue. Section 393.230(4) states that the Commission "... may examine into all matters which may change, modify or affect any finding of fact previously made ..." but that section, generally, applies to "revaluations" of property. Section 386.500 contemplates changes but only in rehearing proceedings. Section 386.490(3), arguably, could authorize such a change in that it provides:

Every order or decision of the commission shall of its own force take effect and become operative thirty days after the service thereof, except as otherwise provided, and shall continue in force either for a period which may be designated therein or until changed or abrogated by the commission, unless such order be unauthorized by this law or any other law or be in violation of a provision of the constitution of the state or of the United States.

Outstate cases cited are not too persuasive or controlling. *Trustees of Saratoga Springs v. Saratoga Gas, Electric, Light & Power Co.*, 191 N.Y. 123, 83 N.E. 693 (1908); *Brooklyn Union Gas Co. v. Prendergast*, 7 F.2d 628 (E.D. N.Y.1925); *Permian Basin Area Rate Cases*, 390 U.S. 747, 88 S.Ct. 1344, 20 L.Ed.2d 312 (1968); *In Re Other Southwest Area Rate Case, Shell Oil Company et al. v. Federal Power Commission*, 484 F.2d 469 (5th Cir. 1973); and *Illinois Bell Tel. Co. v. Illinois Commerce Commission*, 414 Ill. 275, 111 N.E.2d 329 (1953). One statement in the last case is of interest: "[5, 6] The construction contended for seems to be in conflict with the spirit of the act. One of its primary purposes was to set up machinery for continuous regulation as changes in conditions require. It appears to be inherent in the act itself." The statute of Illinois is different from that of Missouri, but we think the "spirit of the act" analysis is logical and should be the

standard in this state. In fact, this court said in *State ex rel. Chicago, R.I. & P.R.R. Co. v. Public Service Commission*, 312 S.W.2d 791, 796 (1958): "Its [Commission's] supervision of the public utilities of this state is a continuing one and its orders and directives with regard to any phase of the operation of any utility are always subject to change to meet changing conditions, as the commission, in its discretion, may deem to be in the public interest." To rule otherwise would make § 393.270(3) of questionable constitutionality as it potentially could prevent alteration of rates confiscatory to the company or unreasonable to the consumers. See, *McGrew v. Missouri Pacific Ry. Co.*, 230 Mo. 496, 132 S.W. 1076 (1910).

[4] Since the very purpose of having the Commission is to have an agency with such expertise as to be sensitive to changing conditions, we rule that the trial court was in error in rejecting the Commission's action in that regard.

[5] Point 2: It seems agreed that the Commission in this case used a combined "test" and "projected" year upon which to rule. The trial court did not decide this point for the reason it would be so interwoven with the question of "reasonableness" of rates as to be considered when, and if, the statutory review on the merits is made, and we refrain for the same reason.

[6] Point 3: Was there compliance with §§ 386.130 and 536.080? The former provides that "... [a] majority of the commissioners shall constitute a quorum for the transaction of any business" and the latter calls for all participating in the decision to "... personally consider the whole record or such portions thereof as may be cited by the parties ..." Apparently, in most instances the Commission certifies compliance with both sections, although

it is presumed that administrative decisions are made in compliance with applicable statutes. *Dittmeir v. Missouri Real Estate Commission*, 316 S.W.2d 1 (Mo. banc 1958), cert. denied 358 U.S. 941, 79 S.Ct. 347, 3 L.Ed.2d 348.

We outline the relevant facts in this case (and respectfully use only the last names of the Commissioners involved). On the date of the Report and Order, the Commission was comprised of four members: Pierce (Chairman), Fain, Reine and Sprague. Sprague, having assumed office after conclusion of all the hearings, did not participate in the decision. Pierce, Fain and Reine certified compliance with the statutes. Thereafter, the applications for rehearing were filed—between June 27-30, 1975. They were denied on July 8, 1975. On that date Reine was no longer a member, but there were five members: Pierce, Fain, Sprague, Jones and Mulvaney. The record reflects that Pierce, Fain and Sprague participated in the denial order. No "certification" was attached. By letter to an attorney for Consumers, Chairman Pierce stated that a ruling on an application for rehearing was not a "final decision" bringing into play the two statutes. At this time we need not explore the validity of that opinion, but we do emphasize that it is a basic and fundamental rule of law that one making a decision be aware by some means of what he is deciding.

[7, 8] Although the burden was on the Consumers, making the challenge, to establish noncompliance by a majority of the Commission, we do not believe it necessary to review further parts of the record to resolve that precise question. However, the facts as to Commissioner Sprague create a possible denial of due process and the actual truth of the matter should be brought forward. To accomplish the same, and hopefully to avoid further delay in this matter, the trial court is directed to modify its "order of re-

mand" to allow Commissioner Sprague ten days to certify to it that he had complied with § 536.080 at the time of denial of the motions for rehearing. Absent such certification, the remand for reconsideration should follow.

Having concluded that the Commission was authorized to entertain a request by the Company for a rate increase under the "file and suspend" method detailed in § 393.140 (11), we consider arguments of the Consumers (and the Public Counsel) that they were thereby deprived of their property without (1) due process or (2) equal protection, contrary to accepted constitutional principles.²

Due Process: The alleged deprivation of due process is bottomed on the fact possible inaction by the Commission, following a new rate filing, could permit the same to become effective absent notice or hearing. Perhaps the two controlling decisions are: *Goss v. Lopez*, 419 U.S. 565, 95 S.Ct. 729, 42 L.Ed.2d 725 (1975) and *Board of Regents v. Roth*, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972). Therein may be found the current procedural due process test. It has two phases. The first calls for consideration of whether or not the individual interest in question is a "protected" interest encompassed within the scope of "life, liberty or property" under the Fourteenth Amendment. If no such interest is found, the test stops there. If resolved otherwise, the second phase calls for balancing the competing interests of the state and the individual. See *Morrissey v. Brewer*, 408 U.S. 471, 483, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972).

[9] In this case, we are of the opinion the first phase of the test is decisive. Consumers' contention of necessity is premised on the argument that they have a protected

2. Motions to strike portions of Consumers' brief re constitutional questions are overruled.

"property" interest in the *present level* of utility rates. We have not been cited any authority for that proposition. On the other hand, there are a number of cases to the contrary.

In *Sellers v. Iowa Power and Light Company*, 372 F. Supp. 1169 (S.D.Iowa 1974, with three judges participating), plaintiffs challenged the constitutionality of a temporary utility rate increase without a hearing with a due process argument. The court said, l. c. 1172:

"Plaintiffs describe the property they claim was taken from them without procedural due process as the money required to pay the rate increases prior to the determination of their legality, thus depriving them of the use and enjoyment of the fruits of their labors or statutory grants which, but for the increases, would have been available to pay other household expenses.

We believe plaintiffs' claim of property interest is too broadly stated to be within the protection of the Fourteenth Amendment. In our opinion plaintiffs must show they have a legal entitlement to or a vested right in the rates being charged before the proposed increase, before they can claim any property rights protected by the United States Constitution.

At common law a public utility 'like the seller of an unregulated commodity, has the right in the first instance to change its rates as it will, unless it has undertaken by contract not to do so'. *United Gas Co. v. Memphis Gas Division* (1958), 358 U.S. 103, 113, 79 S.Ct. 194, 200, 3 L.Ed.2d 153; *FPC v. Hunt* (1964), 376 U.S. 515, 522, 84 S.Ct. 861, 11 L.Ed.2d 878; *United Gas Pipe Line Co. v. Mobile Gas Service Corp.* (1956), 350 U.S. 332, 343, 76 S.Ct. 373, 100 L.Ed. 373; *Gas Service Co. v. FPC* (1960), 108 U.S.App.D.C. 334, 282 F.2d 496, 500.

Conversely, utility customers have no vested rights in any fixed utility rates, *Wright v. Central Kentucky Natural Gas Co.* (1936), 297 U.S. 537, 542, 56 S.Ct. 578, 80 L.Ed. 850; *Norwegian Nitrogen Products Co. v. United States* (1933), 288 U.S. 294, 318, 53 S.Ct. 350, 77 L.Ed. 796; *San Antonio Utilities League v. Southwestern Bell Telephone Co.* (5th Cir., 1936), 86 F.2d 584, cert. den., 301 U.S. 682, 57 S.Ct. 783, 81 L.Ed. 1340; *United States Light and Heat Corp. v. Niagara Falls Gas & Electric Light Co.* (2nd Cir., 1931), 47 F.2d 567, 570, cert. den., 283 U.S. 864, 51 S.Ct. 656, 75 L.Ed. 1469; *Lenihan v. Tri-State Telephone & Telegraph Co.* (1940), 208 Minn. 172, 293 N.W. 601, cert. den., 311 U.S. 711, 61 S.Ct. 392, 85 L.Ed. 463; *Wisconsin Telephone Co. v. Public Service Commission* (1939), 232 Wis. 274, 287 N.W. 122, cert. den., 309 U.S. 657, 60 S.Ct. 514, 84 L.Ed. 1006.

As plaintiffs have no property interest in existing rates which is protected by the Fifth and Fourteenth Amendments, we hold that plaintiffs are not entitled to a procedural due process hearing prior to a determination of the lawfulness of the proposed rate increase and that the Iowa statutory provision in 490A.6 which provide for interim collection of the proposed increase under bond to be refunded if found to be excessive does not violate the Due Process Clauses of the Fifth and Fourteenth Amendments."

The rationale of most of the cases is consistent with the following statement from *Ten-Ten Lincoln Place, Inc. v. Consolidated Edison Co.*, 190 Misc. 174, 73 N.Y.S.2d 2 (1947), to-wit: "Nor has plaintiff any vested right to utility service or to any particular rate except to the extent that the public service law grants him such right; and he is not entitled to invoke his constitutional guaran-

tees of 'due process' or 'equal protection' under such circumstances." (Emphasis added.) We find no provision in the statutory scheme for Missouri granting consumers such a right. Other cases consistent with our conclusion are: *United States Light & Heating Corporation v. Niagara Falls Gas & Electric Co.*, 47 F.2d 567 (2nd Cir. 1931); *City of Birmingham v. Southern Bell Telephone & Telegraph Co.*, 234 Ala. 526, 176 So. 301 (1937); *Smith v. Southern Bell Telephone & Telegraph Co.*, 268 Ky. 421, 104 S.W.2d 961 (Ky.1937); *State ex rel. Evansville Coachlines, Inc. v. Rawlings*, 229 Ind. 552, 99 N.E.2d 597 (1951); and *New Haven v. New Haven Water Co.*, 132 Conn. 496, 45 A.2d 831 (1946). In support of their position, Consumers cite such cases as *Allen v. Coffel*, 488 S.W.2d 671 (Mo.App.1972); *Office of Communication of United Church of Christ v. F.C.C.*, 123 U.S.App.D.C. 328, 359 F.2d 994 (1966); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950); *Templeton v. A.T. & S.F. Ry. Co.*, 84 F.Supp. 162 (W.D.Mo.1949), aff'd 181 F.2d 527 (8th Cir. 1950); *State ex rel. Gentry v. Curtis*, 319 Mo. 316, 4 S.W.2d 467 (Mo. banc 1928); and *Scott v. City of Indian Wells*, 6 Cal. 3d 541, 492 P.2d 1137 (Cal. banc 1972). They do deal with "property rights" but they can not be called persuasive in the area of rate-making.

Equal Protection: It is well settled that a state may classify persons and objects for purposes of legislation, with restraints recently repeated by this court in *Howe v. City of St. Louis*, 512 S.W.2d 127 (banc 1974), l. c. 132, to-wit:

"The rules for judicial review of a legislative classification which is challenged as a denial of equal protection are well settled. The equal protection clause does not forbid a State to create classes in the adoption of regulations under its police power, but it allows wide discretion, precluding only that done without any rea-

sonable basis and therefore arbitrary, or as otherwise stated, it forbids invidious discrimination. *Morey v. Doud*, 354 U.S. 457, 77 S.Ct. 1344, 1 L.Ed.2d 1485 (1957); *Kansas City v. Webb*, 484 S.W.2d 817 (Mo.). Discrimination is arbitrary and unconstitutional if the classification rests upon a ground wholly irrelevant to the achievement of the legislative objective. *Gem Stores, Inc. v. O'Brien*, 374 S.W.2d 109 (Mo. banc 1963). 'Classification of the subjects of legislation is not prohibited by the equal protection of the law clauses of the United States and State Constitutions "if all within the same class are included and treated alike."' *Kansas City v. Webb*, supra; *Burns v. Swenson*, 430 F.2d 771 (8th Cir. 1970)."

[10, 11] There is a substantial difference between a utility and one of its consumers. Only the former would be in a position to suggest the need for new rates (§ 393.140 (11)), by virtue of its singular knowledge as to changing financial conditions and its own present financial status. A consumer, on the other hand, even absent such knowledge is given a legal right to complain (§ 386.390 and § 393.-260) of the new rate. The statutory scheme authorizes the Commission to call for "notice" and "hearing" but does permit approval absent either in certain instances. In that event, the consumer can initiate a complaint to review the validity of a new rate—which results in the same being "temporary" at best. Since the common law prior to the enactment of the Public Service Commission Act in 1913 allowed utilities an absolute right to raise or lower the price of their services without notice and without any kind of regulatory approval, the Act as now written constitutes a fair legislative compromise for both the utility and consumers. Even if the obligation of the Commission to balance "fairness" to the consumers and the utilities be ig-

nored, it is of interest that the General Assembly has created a further protective feature, i. e., enactment of Section 4(6) of the Reorganization Act of 1974 calling for the office of Public Counsel "relating to representation of the public before the public service commission." Page 537, Laws of Missouri, 1973-74. We are of the opinion that the two statutory approaches in question have a rationale basis and do not deny equal protection.

Lastly, the judgment entry quashing the writ of review should be vacated in view of our ruling on Point 4 to avoid further expense and time. If Commissioner Sprague files the certification heretofore called for, the trial court should proceed with the statutory review on the merits; if the certification is not filed and the Commission must reconsider the motions for rehearing, the present record before the trial court can be supplemented and review on the merits can be concluded.

The judgment is reversed and the cause is remanded to the trial court for further proceedings consistent with this opinion.

HOLMAN, HENLEY, FINCH and DONNELLY, JJ., concur.

BARDGETT, J., concurs in result in separate opinion filed.

SEILER, C. J., dissents.

BARDGETT, Judge (concurring in result).

I concur in the result reached by the principal opinion in this case but do so because in this case there was, in fact, knowledge on the part of the parties interested in contesting the proposed increased rates and there was a full hearing conducted with reference to those proposals. I do not agree

that municipalities and consumers have no procedural due process rights with reference to utility rates. While a consumer may not have a property right to the continuation of a specific rate, he does have a right not to be charged unreasonable rates. Whether or not a proposed rate is reasonable is a matter for the Public Service Commission to decide, but, those who will have to pay the increase are, in my opinion, entitled to receive notice of the proposal and be afforded an opportunity to appear and be heard by the commission prior to the rates going into effect.

SEILER, Chief Justice (dissenting).

After consideration of the motions for rehearing and the briefs, I have concluded to withdraw my original vote of dubitante and to file this dissent.

As I understand the principal opinion, it holds that the "file and suspend" method is proper for proposed rate changes by a utility, even where the commission has previously fixed reasonable rates, basing this largely on the conclusion that this method has been used for over sixty years without objection from the general assembly.¹ However, as I understand the motion for rehearing, there seems considerable doubt whether the commission itself has accepted the "file and suspend" method as a proper method to seek a rate increase where the maximum rate had been fixed by statute or order of the commission. Respondent does not clearly assert to the contrary in its response. Relators cite the commission's decision in *Atchison, Topeka & Santa Fe*

1. There is nothing to indicate prior general assemblies were ever made aware that the "file" method could be used by a utility to raise previously established rates without notice or hearing, or that such an intent was being ascribed to the legislature. The present case seems to be the first time the issue has been squarely presented to a Missouri court, so this is not a situation where the legislature has been put on notice by virtue of prior judicial declarations so holding.

Ry. Co., 3 Mo. PSC 75, 85 (1916) where the commission stated that "... a schedule or tariff can only be filed with this Commission as an exhibit as proposed rates not to be effective as lawful schedules or tariffs until after a hearing had and order has been issued by this Commission as provided in the Public Service Commission Law." According to *Marty v. Kansas City Light and Power Co.*, 303 Mo. 233, 259 S.W. 793 (1924), and utility in case No. 1615, 8 P.S.C. R. Mo. 293, used the complaint method to obtain an increase in rates. The briefs on rehearing point out other instances where utilities have proceeded by filing applications for permission to put increased rates into effect, some as recent as 1968 and 1969. The rules of the commission provide for the filing of applications for authority to change rates. It would appear, therefore, that there is considerable support for the proposition that the "file" method has been used where the commission has not previously fixed rates and the "complaint" or application method has been used where it has previously fixed rates. If this is true, then it would appear that much of the historical underpinning on which the principal opinion relies is removed and that the position adopted by the New York court in construing statutes similar in relevant aspects to ours, *In re Dry Dock, East Broadway & Battery R. Co.*, 254 N.Y. 305, 172 N.E. 516, 518 (1930) warrants serious consideration.² In the New York Public Service Commission law, Sec. 29 corresponded to our "file" method, while Sec. 49 corresponded to our "complaint" method. The court of appeals of New York said as follows:

"... By section 49 of the law, machinery was created by which rates, which previously could be changed only by the action of the Legislature, might thereafter be changed by order of the commission as

2. It is of interest and relevance that the Missouri Public Service Commission Act was based upon the 1907 New York Act. Annual Report, Mo.P.S.C., Fiscal year 1971-72, p. 4.

superintending agency of the state. To that agency the Legislature delegated the function of exercising the regulatory powers of the state systematically and in accordance with prescribed rules, and imposed the duty upon it of changing rates fixed by law when these rates are shown to be unjust and unreasonable. By section 29 the Legislature restricted the power of the carrier to fix its own rates in the field where previously the state had not chosen to exercise its regulatory power. Provision was made in that section intended to afford the agency of the state opportunity to interdict any change before it became effective if it appeared that the new rate was unreasonable. The two sections are intended to cover separate fields. In the field where change in rates can lawfully be effected only by affirmative action of the state, section 49 makes provisions for such action by its agency. In the field where change in rates may lawfully be effected unless the state interposes its veto, section 29 provides opportunity, before the change becomes effective, for determination whether such a veto would be reasonable. No other construction of the statute accords with either the letter or the spirit of the statute."

Therefore, I believe the trial court was correct in the case before us when it declared: "The proceedings which resulted in the report and order under scrutiny were initiated by the filing by MPS of revised rate schedules. The exclusive procedures under Sec. 393.270, V.A.M.S. are respondent's own motion or complaint of any interested party. It follows that the proceedings and resulting report and order were and are a nullity . . ."

On the due process issues which are, in my opinion, directly involved in any rate increase case, I agree with Judge Bardgett's statement in his opinion concurring in result that

a consumer does have the right not to be charged unreasonable rates and that those who will have to pay the increase are entitled to receive notice of the proposal and be afforded an opportunity to appear and be heard by the commission prior to the rates going into effect.

Under the "file" method of Sec. 393.140(11), all the utility need do is to file the increased tariff and give thirty days notice to the commission. The commission may, but is not required to, order publication for thirty days. The utility does not contend the commission is required to give notice and, in fact, both the utility and the commission take the position that the "file" method of rate increase is valid without any requirement of notice or hearing. As I understand the facts in the case before us, there actually was no such order of notice made by the commission and the only public notice of the filing was whatever came about by reason of a newspaper story on the subject and whatever voluntary notice was given the parties concerned. This, of course, would not constitute a due process notice. Volunteered notice or notice by grace is not sufficient due process, *Mullane v. Central Hanover Bank Tr. Co.*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950); *Harris v. Bates*, 364 Mo. 1023, 270 S.W.2d 763 (1954); *Hess v. Pawloski*, 274 U.S. 352, 47 S.Ct. 632, 71 L.Ed. 1091 (1927); *Wuchter v. Pizzutti*, 276 U.S. 13, 48 S.Ct. 259, 72 L.Ed. 446 (1928).

Under the principal opinion the commission when a tariff or increase of rates is filed might (as it legally could) do nothing and thirty days later the customers would be paying higher rates without knowing what happened to them. In fact, if the commission so decided for "good cause", the increased rates could go into effect almost immediately, as the statute allows the commission under those circumstances to forego the thirty days notice. All this could be done without the utility making any actual show-

ing whatever that its present rates were unreasonable, because the statute does not require the filing of anything more than whatever is contained in the tariff sheet and the tariff sheet is nothing more or less than a price list.

The principal opinion rejects the due process argument advanced by relators on the basis that there is no protected property interest in the present level of utility rates. It seems to me, however, that what the consumers are contending here is not that they have the property right in a specific fixed utility rate, but that they have a right to receive notice of any proposed rate increase and to be afforded an opportunity to be heard prior to an increase going into effect. They do not claim a right to a specific rate but they do claim the right to just and reasonable utility rates, which is what is required by the statute. Sec. 393.130-1 requires that all charges made by a public utility "shall be just and reasonable." Sec. 393.130-3 requires that the utility serve all alike and a consumer, therefore, cannot be denied service at the will of the utility. Sec. 393.280 provides that if the company charges more than the price fixed by the commission, no recovery can be had in an action to collect for the electrical service and the making of the excessive charges is a complete defense to the action. These statutory provisions establish a right of entitlement in the consumer to a "just and reasonable" rate, charge or price. It is part of the "spirit of the act" standard referred to in the principal opinion. In *Ohio Bell Telephone Company v. Public Utilities Commission of Ohio*, 301 U.S. 292, 304-5, 57 S.Ct. 724, 730, 81 L.Ed. 1093 (1937), the court talked about a fundamental right of due process in all persons affected by the actions of a utility regulatory commission as follows:

" . . .

"All the more insistent is the need, when power has been bestowed so freely [referring to the broad powers with which a public service commission has invested], that the 'inexorable safeguard' . . . of a fair and open hearing be maintained in its integrity . . . The right to such a hearing is one of the 'rudiments of fair play' . . . assured to every litigant by the Fourteenth Amendment as a minimal requirement . . ."

If more is needed, we can properly look to the substantial investment which electric utility consumers have in their electrical appliances and systems. As pointed out in the briefs, the utility has invested approximately \$1,945 worth of capital for each of its 110,000 customers and now has \$1,709 worth of facilities (original cost) for each of these customers. A customer who has invested in the cost of the electrical system in his residence or business and then further invested in the cost of various electrical appliances (e. g., refrigerator, lighting fixtures, television set, range and oven, washer and dryer, radio, dishwasher, freezer, vacuum sweeper, sewing machine, furnace, air conditioner, and dehumidifier) has much more at stake on an individual and collective basis than does the company. It is common knowledge the electric companies advertise and promote such investments. The property rights of the customers in terms of their investment are many times greater than those of the utility. Who of us these days has any real choice in deciding whether or not to use electricity in his home or business? It is not realistic to say that electric consumers do not have a direct property interest in, and right to, just and reasonable electric rates. Both the Missouri statutes and their property investment give consumers sufficient entitlement to bring them under Fourteenth Amendment protection.

The principal opinion relies to some extent upon *Sellers v. Iowa Power & Light Company*, 372 F.Supp. 1169 (S.D. Iowa 1974), but in Iowa the statute extended to the consumer in lieu of a procedural due process safeguard, a comparable safeguard guaranteeing his right to a just and reasonable rate in the form of a right to a refund for any payments for utility services in excess of the rate finally approved by the Commission. The Iowa statutes provide both for a refund bond and a hearing before rates can be charged which are not subject to refund. There is no such protection in Missouri. The Missouri commission has no power to promulgate an order requiring a pecuniary repayment or refund, *Straube v. Bowling Green Gas Company*, 360 Mo. 132, 227 S.W.2d 666, 668 (1950) and once the utility collects in accordance with rate schedules, the amount so collected cannot be taken away, *Lightfoot v. City of Springfield*, 361 Mo. 659, 236 S.W.2d 348, 354 (1951), nor under the "file" method available henceforth to the utilities is there any guarantee of an opportunity to be heard before the rates are increased.

It is true that consumers in Missouri could file a complaint after the rate had been increased under the "file" method, but then the burden of proof is on the consumer and it is impossible for the average consumer to do anything effective about making such a complaint or investigation. It would take thousands of dollars in fees and expenses for the expert testimony and services of counsel required to carry such a burden.

It seems to me that the result of the principal opinion in holding that there is no need to afford procedural due process to the consumer means that as a practical matter a consumer has no way to insist on his right to "just and reasonable" electrical rates. Under the principal opinion electric rates can be raised without any notice or hearing for

consumers, without any evidence of reasonableness whatsoever, and despite the fact that such an increase in rates means that the substantial investment of the individual consumer in his electrical system and appliances is diminished without his having any alternative source of electrical service since the utility has a state protected monopoly.

Even if we were to say the consumer has only a privilege to obtain electricity at the current price, it is a most valuable privilege and "Valuable privileges . . . are also entitled to the protection of law." *Alpert v. Board of Governors of City Hospital*, 286 App.Div. 542, 145 N.Y.S.2d 534, 538 (1955), where the court held that despite the fact there is no constitutional right to practice medicine in a public hospital, any more than there is an absolute right to sell liquor or drive an automobile, it is a valuable privilege and therefore it was illegal to exclude petitioner, a qualified physician, without notice and an opportunity to be heard.

Additionally, it seems to me that under the law laid down by the principal opinion there is a vast inequality of protection between the rights of the consumer to have rates which are not unreasonably high and the rights of the utility to have rates which are not unreasonably low. As has earlier been stated, under the "file" method the utility need give no notice and if the commission so decides the rates can go into effect immediately. If a consumer makes a complaint, however, he must set forth allegations of fact which if proven will entitle him to relief and there is an express requirement that notice be given the utility, see Sec. 386.390 and Sec. 393.260, and then the consumer must carry the burden of convincing the commission in the course of a long and expensive hearing. In *Kansas City v. Webb*, 484 S.W.2d 817, 825 (Mo. banc 1972), the court was faced with a constitutional challenge to a city ordinance which limited individual condemnees to a trial by jury by six free-

holders while providing a corporate condemnee the option of choosing either a common law jury or a jury of six freeholders. In respect to this unequal treatment, the court said as follows:

"... Granting to a corporate owner of land the right to elect between a trial by common law jury or a freeholders' jury but denying the same right to an individual landowner similarly situated clearly discriminates between the two types of owners without any rational basis for differentiation. It creates an artificial classification bearing no reasonable, just or proper relation to the object of the legislation ..."

So it is, it seems to me, in the present case. There is no rational basis for creating two sets of remedies, one significantly more favorable than the other. This is particularly true in light of the clear expression of legislative intent that there be only one remedy common to all who challenge the validity of the commission's order.

I would affirm the judgment of the trial court and respectfully dissent from the principal opinion.